Supreme Court, U. S.
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No. 75-122

In the

Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No.

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 23, 1975.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the trial judge which is not reported is printed in Appendix A hereto, infra, p. 1a. The opinion of the Court of Appeals which is not reported is printed in Appendix B hereto, infra, p. 7a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) providing for jurisdiction on writ of certiorari granted to persons appealing from the decision of a United States Court of Appeal.

QUESTIONS PRESENTED

1. Should antitrust immunity under *Parker* v. *Brown* be granted to a business activity because it is referred to in a tariff when there is no legislative imperative nor evidence that a regulatory agency considered the practice?

2. Under what circumstances should a *Parker* v. *Brown* exemption to the antitirust laws be granted by Summary Judgment?

STATUTE INVOLVED

The statutory provision involved is Section 460.6 of the Michigan Compiled Laws ~~(official citation)~~, which is printed in Appendix C at page ~~9~~a.

STATEMENT OF THE CASE

This action is brought under Sections 1 and 2 of the Sherman Act (15 USCA Sections 1 and 2 (1970)), and Section 3 of the Clayton Act (15 USCA Section 14 (1970)) by Plaintiff Lawrence Cantor, who operates a retail drugstore in Detroit, Michigan. The Complaint alleges that Plaintiff has been injured by Defendant Detroit Edison's practice of requiring certain of its customers to pay for light bulbs as a condition to purchasing electric energy. Jurisdiction is based on 28 USCA Section 1337 (1970), conferring jurisdiction on the federal courts with

respect to civil actions arising under the federal antitrust laws.

It is uncontradicted that Detroit Edison ties the sale of light bulbs to the sale of electricity in its market territory of Eastern Michigan, which includes the City of Detroit and its environs. Edison's cost of the bulbs distributed in the tie-in program in a recent two-year period was approximately $5,000,000. The district court, based upon Edison's inclusion of a description of the tie-in within its electricity rate tariff, found the tie-in to be exempt "state action" under *Parker* v. *Brown,* 317 U.S. 341 (1943), and it granted Edison's motion for summary judgment.[1] (See Appendix A). The United States Court of Appeals for the Sixth Circuit on April 23, 1975 adopted the opinion of Judge John Feikens.

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[1] Tariffs and changes in tariffs are generally initiated by the business affected. They become binding either by filing without objections or upon some affirmative action of a regulatory agency. The latter situation exists in this case. There is no legislation in Michigan requiring, directing or authorizing the tie-in, nor is there any rules or regulation requiring all (or any) of Edison's business practices be set forth in a tariff. In support of its motion for summary judgment, Edison produced no affidavits from regulatory officials or material from agency files to show the light bulb program was ever considered or reviewed by the appropriate authorities in Michigan. In depositions, Edison's officers admitted they were unaware of any formal proceedings before a regulatory agency in Michigan in which the light bulb tie-in was considered.

REASONS FOR GRANTING THE WRIT

1. Decisions by the various United States Courts of Appeal have been ". . . dissimilar and often inconsistent . . ."[2] as to the applicable test of law to determine the existence of a state action exemption. Though they use different words and explanations, the Fifth and First Circuits and district courts of the Ninth Circuit allow the exemption only if the state has exercised informed and considered judgment of the practice or activity under attack. General supervisory duty of a regulatory agency over the defendant is not enough. These words are used expressly in *Gaslight Company of Columbus* v. *Georgia Power Co.*, 440 F. 2d 1135, 1139-40 (5th Cir. 1971), *cert. denied* 404 U.S. 1062 (1972):

> "Our view is that the *Parker* exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subject to meaningful regulation and supervision by the state *to the end that they are the result of the considered judgment of the state regulatory authority,* here the Georgia Public Service Commission." 440 F. 2d at 1139-40 (emphasis supplied).

In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, 30 (1st Cir. 1969), *cert. denied* 400 U.S. 850 (1970), the First Circuit said the exemption should be allowed ". . . only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts an alternative form or public regulation." *Whitten* was quoted at length when the

[2] Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 Northwestern L. Rev. 71, 91 (1974)

Fifth Circuit denied a *Parker* exemption in *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F. 2d 1286, 1294-5 (5th Cir. 1971), *cert. denied* 404 U.S. 1047 (1972). See also *Marnell* v. *United Parcel Service,* 260 F. Supp. 391, 409-10 (N.D. Cal. 1966), and *International T. & T. Corp.* v. *General Tel. & Elec. Corp.,* 351 F. Supp. 1153, 1199-1203 (D. Hawaii 1972).

The Court of Appeals for the District of Columbia reached a similar conclusion using the state action analysis to resolve a conflict between a District agency and the antitrust laws. *Hecht* v. *Pro-Football, Inc.,* 444 F. 2d 931, 934-42 (D.C. Cir. 1971), *cert. denied* 404 U.S. 1047 (1972).

In contrast, the Fourth Circuit has protected a utility's anticompetitive practice as long as it was covered by an operative tariff with little analysis of the agency's investigating process. *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Company of Virginia,* 480 F. 2d 754 (4th Cir. 1973). In another case the same court granted immunity to another utility's anticompetitive activity merely because the state could have but did not stop it. *Washington Gaslight Company* v. *Virginia Electric Power Co.,* 438 F. 2d 248 (4th Cir. 1970).

With its decision in the instant case and in *Lamb Enterprises* v. *Toledo Blade Company,* 461 F. 2d 506 (6th Cir. 1972), the United States Court of Appeals for the Sixth Circuit has aligned itself with the Fourth Circuit, at least with the *Business Aides* decision if not with *Virginia Electric,* giving credence to the theory that any private action of a state supervised business can constitute state action without a legislative directive or evidence of informed and considered judgment by the state as long as the activity in some way is incorporated in the tariff sheet.

2. The rule of law applied by the court below is improper and conflicts with the decisions of this Court in *Parker* v. *Brown,* 317 U.S. 341 (1943) and *Goldfarb* v. *Virginia State Bar Association, et al.,* slip op. No. 74-70, decided June 16, 1975. Chief Justice Burger in *Goldfarb,* restating *Parker,* held that the state action exemption applies only to *activities* which are *required* by the state acting as a sovereign (slip op. p. 16).

In contrast, the District Court in the instant case quoted the Fourth Circuit holding in *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Company of Virginia, supra,* as the determinative principle of law, to-wit:

> "If (Edison's) action were occasioned by adherence to the rules and regulations of its operative tariffs then it is shielded from liability for any possible antitrust violation." 480 F. 2d at 756. See Appendix A, infra, p. 3a.

The reliance by the Court below on the Fourth Circuit's view of the *Parker* exemption should be examined carefully as it was the Fourth Circuit's opinion that was reversed in *Goldfarb.*

The test relied on by the Court below and the Fourth Circuit makes the question of antitrust exemption for regulated industries turn on whether the utility is operating in accordance with a tariff rather than on whether the utility's business *activity* has been *required* by the state as a sovereign. While in many cases the inclusion of a specific business activity in a tariff may be indicative of state direction, the existence of the tariff is not the end of the inquiry required by *Parker* and *Goldfarb.* To make tariffs sacrosanct permits a regulated business to escape antitrust restraints for any business activity

which it can cover or to which it can make reference in its tariff. Surely, this gaping hole in antitrust enforcement is not intended by this Court. Nor do any decisions hold that the test is the degree of general regulation to which a defendant in an antitrust action is subject, although the Court below viewed this as material.[3] Whether a particular business activity of a regulated company is exempt from the antitrust laws should require that an inquiry be made to determine whether the state, acting as a sovereign, has considered the benefits and burdens of the specific conduct or activity under attack.[4]

3. The question presented is of importance in the administration of the antitrust laws, particularly as they apply to public utilities and other regulated businesses.

---

[3] The trial court, having adopted the tariff sheet theory, was compelled to acknowledge precisely what Petitioner contends, *i.e.,* that the light bulb program may not have been considered by the Michigan Public Service Commission. For, in the final paragraph of his opinion, with some magesterial imprecision, the Court attempts to sweep away the issue presented by this petition stating:

> "The Court agrees with Plaintiff that a state should consider the effects on competition of facilities such as these. But it is the effect of the entire project which must be examined and this is done in proceedings involving franchises and certificates of convenience. Neither statute, case law nor common sense require the state to scrutinize each small facet of a comprehensive scheme for its effect on competition." Appendix A, infra, pp. 4a-5a.

[4] This Court's recent decision in *Gordon et al.* v. *New York Stock Exchange, Inc. et al.,* No. 74-304, slip op. decided June 26, 1975, supports petitioner's view of the applicable law. The decision in *Gordon* in favor of exemption turned on the fact that the S.E.C. had specific statutory authority to regulate commission rates and had for many years prior to commencement of the action been actively studying commission policies of the N.Y.S.E.

There are literally hundreds of federal, state and local agencies which approve tariffs of many kinds of regulated private businesses. Tariffs and the activities of regulatory agencies doubtless have a great impact on the economy.[5] If each of these agencies could confer antitrust immunity with respect to every program incorporated into a tariff sheet there would be great potential for unjustified harm ". . . to the free interaction of market forces (which) produce efficient resource allocation." Kauper, *Department of Justice: Antitrust Prospectives,* 36 U. Pittsburgh L. Rev. 667 (1975).

This Court has often said that approval of a private business activity by the state is not enough to establish antitrust exemption. *E.g., Parker* v. *Brown, supra,* at p. 351; *Ottertail Power Co.* v. *United States,* 410 U.S. 366, 373-375 (1973). The instant case presents an ideal opportunity for this Court to establish meaningful standards in determining the difference between mere authorization or approval on the one hand and direction and command by the sovereign on the other. In this effort, the Court can make it clear to regulators and the industries they supervise the level of investigation and consideration which must be given to business activities—including the effect of those activities on competition—to establish an antitrust exemption.

The problems of regulatory agencies' responsibilities and antitrust immunity currently are of great concern to legal scholars, economists, the affected industries and the

[5] For a discussion of one economist's view of the impact of regulatory agencies see Samuels, *Public Utility Rate Making and Competitive Structure—Carterfone in Jeopardy,* 20 Wayne U. L. Rev. 819 (1974).

Attorney General of the United States.[6] And, in view of the number of cases in this area reaching the U.S. Courts of Appeal recently, their conflicting results, and the numbers of important cases pending in the trial where this is a critical issue, Supreme Court review of this case is appropriate.

[6] See, Samuels, *Public Utility Rate Making and Competitive Structure—Carterfone in Jeopardy,* 20 Wayne U. L. Rev. 819 (1974); Kauper, *Department of Justice: Antitrust Prospective,* 36 U. of Pittsburgh L. Rev. 667 (1975); Kauper, *National Energy Policy and the Antitrust Laws,* 15 Atomic Energy Law Journal, 265 (1974), Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 Northwestern University L. Rev. 71 (1974). Several actions are pending in the federal courts brought by the United States against regulated industries in which the state action defense has been raised. Petitioner is aware of these pending cases: *United States* v. *American Tel. & Tel. Co.,* Civil Action #74-1698, and *United States* v. *Morgan Drive Away, Inc., et al.,* Civil Action ~~#[illegible]~~, both of which are pending in the United States District Court for the District of Columbia.

#74-1761

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MEMORANDUM OPINION
(Filed July 3, 1974)

Plaintiff, the owner of a drug store, sells electric light bulbs and brings this antitrust case charging that the defendant utility company has damaged him in his business.[1] The defendant, The Detroit Edison Company, supplies residential subscribers with electric light bulbs for such homes. Plaintiff claims that this anticompetitive practice injures him since he must sell his light bulbs while defendant replaces these bulbs without charge when they burn out, and thus he contends defendant has violated both the Sherman and the Clayton Acts (more specifically, Section 2 of the Sherman Act, 15 U.S.C. §2, and Section 3 of the Clayton Act, 15 U.S.C. §14). Defendant has moved for summary judgment contending that it is shielded from liability under these federal statutes in that the utility is completely regulated by the Michigan Public Service Commission — that this involvement by the Commission in its business affairs constitutes "state action." It claims arguendo that it is not in violation of these statutes but that if it is in fact in violation, it is shielded from liability.

Plaintiff contends that defendant instituted the free light bulb plan for the sole purpose of increasing electrical consumption, a purely private motive, and that at best the Michigan Public Service Commission has rubberstamped this plan. He adds that the Michigan Public Service Commission receives only sketchy data from defendant regarding this plan, that the Commission has never conducted open hearings on the light bulb program and that it does not regulate any of the administrative details of the program, such as bulb life and wattage.

[1] The complaint purports to be a class action suit, but no class has been certified.

Defendant argues that Michigan law gives the Commission plenary power to regulate utility companies. M.C.L.A. 460.6 provides:

> "It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities."

Defendant says that the Commission issued its order U-3910, dated August 19, 1972, under the authority conferred upon it by this statute and that the order made "lamp supply" a mandatory service under the approved rate structure. Defendant contends that it cannot abandon that service unilaterally and that it must obtain a superseding ruling if it wished so to do. In support of this observation it cites its bulb program for commercial subscribers. Here, before issuing order U-1791 in 1964 giving to the defendant the right to discontinue this specific program, the Commission required the defendant to supply it with substantial financial information including data on the direct costs of that plan.

Thus the question which must be decided in order to determine whether summary judgment lies is whether the defendant's light bulb program can be characterized as state activity or private activity. If this light bulb program is in law state activity, summary judgment in favor of the defendant would be appropriate since in such instances the utility would be shielded from claimed antitrust violations.

In the lead case, *Parker* v. *Brown,* 317 U.S. 341 (1942), the United States Supreme Court held that a cooperative price fixing agreement among California raisin growers did not violate federal antitrust laws if the agreement "derived its authority and its efficacy from the legislative command of the state and was not intended to become effective without that command." 317 U.S. at 350. Cases interpreting *Parker* in the context of utility regulation

have generally reached the same result. When a state agency acts affimatively in approving rates and practices of a utility, there is no antitrust liability.

> "Our view is that the *Parker* exclusion applies to the *rates and practices* of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority." *Gas Light* v. *Georgia Power,* 440 F.2d 1135 (5th Cir. 1971) (emphasis supplied).

This rate structure theory has been succinctly stated:

> "If its actions were occasioned by adherence to the rules and regulations of its operative tariff, then it is shielded from liability for any possible antitrust violation." *Business Aides* v. *Chesapeake Telephone,* 480 F.2d 754 (4th Cir. 1973) at 756.

See also Allstate v. *Lanier,* 361 F.2d 870 (4th Cir. 1966); *Marnell* v. *United Parcel,* 260 F. Supp. 391 (N.D. Cal. 1966).

Applying these principles to the case at bar, it appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.

It also appears that under M.C.L.A. 460.6 the Commission is given continuing jurisdiction to supervise the "rates," "services" and "operation of a utility such as defendant and under M.C.L.A. 460.557 any consumer is given the right to challenge the "service rendered" in

proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine.

Plaintiff also contends that a state must consider the effects of a regulated practice on competition before enacting it. To this effect he cites two categories of cases: those involving large corporate mergers [*International Telephone* v. *General Telephone,* 351 F.Supp. 1153 (D. Hawaii 1972) and *U.S.* v. *Pacific Southwest Airlines,* 358 F.Supp. 1224 (C.D. Cal. 1973)], and those involving either fraud or collusive bidding [*Woods Exploration* v. *Alumnium Company of America,* 438 F.2d 1286 (5th Cir. 1971) and *Whitten* v. *Paddock Pools,* 424 F.2d 25 (1st Cir. 1970)].

The case at bar is clearly distinguishable. Despite plaintiff's allegation that defendant is "hiding" the true costs of the bulb program, this court can find no fraud of the type involved in *Woods.* Nor is this a case involving bidding of any type. The telephone and airline cases cited by plaintiff involve situations where one regulated enterprise is attemping to expand by buying or merging with another. In those cases it was necessary to evaluate the effect on competition of the proposed change. That was the central issue.

Here, defendant has already obtained a franchise to do business in every municipality in which it operates, and M.C.L.A. 460.502 *et seq.* provides that any utility seeking to introduce new services or facilities in an area already served must first obtain a certificate of public convenience and necessity. The court agrees with plaintiff that a state should consider the effects on competition of facilities such as these. But it is the effect of the entire project which must be examined, and this is done in proceedings involving franchises and certificates of convenience. Neither statute, case law nor common sense requires the state to scrutinize each small facet of a

comprehensive scheme for its effect on competition. And certainly the court should not step in when the Commission has not even been approached by plaintiff.

Defendant's motion for summary judgment is hereby granted.

An appropriate order may be submitted.

/s/ John Feikens
John Feikens
United States District Judge

Dated: Detroit, Michigan
July 2, 1974

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

At a session of said Court held in the Federal Building, City of Detroit, State of Michigan, this 21st day of August, 1974.

Present:

The Honorable John Feikens
District Judge

This matter having come on for hearing upon Motion of Defendant Detroit Edison Company for Summary Judgment; the parties having stipulated that such Motion be initially limited to the "state action exemption" issue; the parties having filed affidavits, depositions, exhibits and briefs on such issue and the Court having heard oral argument thereon; the Court being fully advised in the premises and having rendered a written opinion on July 2, 1974; in accordance therewith:

It Is Ordered And Adjudged, that the Defendant's Motion for Summary Judgment be, and the same hereby

is, Granted, and that judgment be, and the same hereby is, Entered in favor of the above-named Defendant.

/s/ John Feikens
District Court Judge

Approved for Entry:
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APPENDIX B

No. 74-2136

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE CANTOR, d/b/a Selden Drugs Co., individually and on behalf of all other retail sellers of light bulbs similarly situated,

Plaintiff-Appellant,

vs.

THE DETROIT EDISON COMPANY,

Defendant-Appellee.

ORDER
(Filed Apr 23 1975)

Before: PECK, McCREE, and LIVELY, Circuit Judges.

The appeal from summary judgment for appellee in an anti-trust action alleging that appellant, who sells incandescent light bulbs at retail, has been injured by Detroit Edison's practice of furnishing to residential customers light bulbs as well as electric energy for a single monthly rate having come on to be heard on the record on appeal and upon the briefs and oral argument of counsel;

And it appearing that in the posture of the case submitted on motion there was no genuine issue as to any material fact and that a question of law was properly before the district court for determination;

And it appearing that the district court correctly followed the applicable precedents in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice

within the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943);

Upon consideration, it is ordered that the judgment be, and it hereby is, Affirmed for the reasons stated in the memorandum opinion of the district court, filed July 3, 1974.

Entered by order of the court
/s/ John P. Helman
Clerk

APPENDIX C

Statutory Provisions Cited and Quoted

CLAYTON ACT

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 6. The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate or cooperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.

The commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and conferred under the various provisions of the statutes creating the Michigan railroad commission and its successor, the Michigan Public utilities commission, and defining their powers and duties.